Supreme Court, U.S.
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No. 02-640

In The

Supreme Court of the United States

LINDA A. ANDE, CHARLES ANDE,
and C.E.A., Their Minor Child,

Petitioners,

v.

NORMAN C. FOST, PHILIP M. FARRELL,
ELAINE H. MISCHLER, and ANITA LAXOVA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a decision by this court is needed to clarify that when an individual is not in a custodial setting in which the State has limited her ability to care for herself and the State did not place the individual in a position of danger she would not otherwise have faced, the State has no constitutional duty to provide substantive services to her.

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ARGUMENT FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DENIED BECAUSE C.E.A. WAS NOT IN A CUSTODIAL SETTING IN WHICH THE STATE LIMITED HER ABILITY TO CARE FOR HERSELF AND THE STATE DID NOT PLACE HER IN A POSITION OF DANGER SHE WOULD NOT OTHERWISE HAVE FACED.

Notwithstanding the argument of the petitioners ("Andes") to the contrary, both the Dane County Circuit Court and the Wisconsin Court of Appeals reached the correct result in what is a relatively simple and straightforward case based on well-established legal precedent.

The Andes' claim under 42 U.S.C. § 1983 is that respondents Fost, Farrell, Mischler, and Laxova ("State") violated their *substantive* due process rights under the Fourteenth Amendment by placing C.E.A. in the control group as part of the cystic fibrosis ("CF") study. However, placing C.E.A. in the control group meant only that she would be treated no differently than if there had been no study (petition, App. 22). Indeed, the Andes didn't even know C.E.A. was in the control group until late June, 1995, when, at almost two years of age, a "sweat test" performed as part of ordinary medical care confirmed that she had CF (petition, App. 30).

Hence, the Ande's entire argument is based on the assumption that the State had a duty under the substantive due process clause of the Fourteenth Amendment to take some affirmative action to see that the Andes were informed

that C.E.A. tested positive for CF much earlier, at birth, although it was not standard medical practice to do so, and that she was offered pre-symptomatic treatment. Moreover, to have provided the additional service would have impaired the integrity of the study. (In addition, the Andes argue that the State was required by substantive due process to obtain their informed consent before placing C.E.A. in the control group even though there was no medical treatment to which informed consent could have been given).

However, the substantive due process clause imposes a duty on the State to assume some responsibility for the general well being of a person only if the State takes the person into custody. *DeShaney v. Winnebago Soc. Serv.*, 489 U.S. 189 (1989) and cases cited therein; "The State's duty to protect does not arise from the State's knowledge of the person's problems, 'but from the limitation which [the state] has imposed on [the individual's] freedom to act on his own behalf.'" *Dykema v. Skoumal*, 261 F.3d 701, 705 (7th Cir. 2001) (quoting *DeShaney*, 489 U.S. at 200). See also *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993) (quoting *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc) "'([T]he Due Process Clause imposes a duty on state actors to protect or care for citizens in two situations: first, in custodial and other settings in which the State has limited the individuals' ability to care for themselves; and second, when the State affirmatively places a particular individual in a position of danger the individual would not otherwise have faced.)'(citations omitted);" *Archie v. City of Racine*, 847 F.2d 1211, 1223 (7th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1065 (no § 1983 liability for failure to provide requested emergency services: "The state did not cause DeLacy's diseases or otherwise propel her into danger .... It did not take DeLacy into custody. It did not hinder her from seeking other sources of

aid.... It therefore did not violate her rights under the Due Process Clause").

Here, the undisputed facts establish that C.E.A. was not in a custodial or other setting in which the State limited her ability to care for herself and that the State did not affirmatively place her in a position of danger she would not otherwise have faced: The State did not cause C.E.A.'s CF; it did not prevent her from seeking medical care; nor have the Andes presented any evidence that C.E.A. would have been tested for CF if there had been no CF study. In sum, the actions of the State placed the Andes in no worse position than they would have been had there been no study.

> The Due Process Clause
>
> forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text.

DeShaney, 489 U.S. at 196.

What the Andes are proposing is an expansion of the concept of substantive due process that would have required the State to take affirmative action to protect the Andes by providing them with pre-symptomatic diagnosis of and treatment for C.E.A.'s CF. This position leaves virtually no limits on an expanding concept of substantive due process. Further, an expansion would be contrary to *DeShaney* and ignore this Court's own "'reluct[ance] to expand the concept of substantive due process because guideposts for

responsible decision-making in this uncharted area are scarce and open-ended.'" *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992).

In addition, any such expansion would, in any event, clearly entitle the State to qualified immunity since it would represent an unprecedented change in substantive due process law.

II. THE PETITION SHOULD BE DENIED BECAUSE THE STATE HAD NO CONSTITUTIONAL DUTY TO FUND COMPLETION OF THE TESTING ON C.E.A.'S BLOOD SAMPLE TO DETERMINE WHETHER SHE TESTED POSITIVE FOR CF.

The Andes' qualified immunity argument is internally inconsistent. On the one hand, they argue that the general statement of the law with respect to the right to bodily integrity applied "with obvious clarity" to the State's conduct (petition at 19). On the other hand, the Andes argue that there is a "desperate need" (petition at 14) for this Court "to clearly delineate" (petition at 17) the applicability of this general statement to the State's conduct.

The Andes assert that "the unlawfulness of such conduct can surely be inferred from the existing line of cases which makes it unlawful to subject humans to invasive medical experimentation without their consent" (petition at 14) and that "The conduct at issue in this case is so egregious, and so stunning, that there need not be any factually similar case at all" (petition at 23). Yet, they concede that actions like the State's "are all acceptable practices in the field of human medical research" (petition at

16). In addition, the Dane County Circuit Court found that the CF study had "[National Institutes of Health] funding and the [Institutional Review Board's] ongoing approval" (petition at App. 24; footnotes omitted).

The fact is there are no analogous cases because it is clear that a State does not violate a person's substantive due process rights by virtue of the fact that the person is a member of a control group in a research study. For the control group is not treated any differently than the general public, or, as the Dane County Circuit Court put it, the result of the CF study on the control group was "not doing anything other than what has always been done which in this case amounted to leaving them alone" (petition, App. 22). The State did not know that C.E.A. had CF. The Andes would require the State to ensure that a person's interest in bodily integrity does not come to harm by means of which the State might not even be aware.

Indeed, in the CF study, the testing on the blood of those children in the control group was not even completed until they either reached four years of age (petition, App. 5 n. 3) or, as in the case of C.E.A., when the children were diagnosed with CF by the traditional "sweat test" (petition, App. 28). Consequently, the State was not even aware that C.E.A. had tested positive for CF until after she was diagnosed with CF using the "sweat test" (petition, App. 30). For it was only after the "sweat test" confirmed the diagnosis (*ibid)* that, in accordance with the design of the study (petition, Ap. 5 n.3), the testing on C.E.A.'s blood sample was completed and showed that she had CF. In other words, the Andes knew before the State did.

Therefore, the Andes' argument is really that the State violated their substantive due process rights by not completing the testing on C.E.A.'s blood sample as soon as it was taken and then informing them that C.E.A. had tested

positive. But the non-reporting is not invasive of the body. Moreover, unless the State has placed an individual in a custodial setting or has placed the individual in a position of danger in which the individual would not otherwise have been placed, the State has no constitutional duty to fund medical services or to provide any other substantive services to them. *DeShaney*, 489 U.S. at 196.

Consequently, contrary to what the Andes' claim, what cannot only be inferred from previous cases but is, in fact, abundantly clear from them, is that the State had no constitutional duty to test C.E.A.'s blood sample at all. And without such a duty, the State certainly could not have had a constitutional duty to inform the Andes of the results it didn't have because the testing had not been completed.

Under the Andes' argument, every time a State believes certain medical services would be beneficial to its citizens it would have a constitutional duty to expend money and other resources to provide those services or risk violating the substantive due process rights of its citizens. This Court has held to the contrary a number of times. *DeShaney*, 489 U.S. at 196.

If, as the Andes contend, "Qualified immunity was improperly granted" (petition at 17; emphasis omitted), it was not "because the lower courts' decisions conflict with this Court's decisions in *United States v. Lanier*, and *Hope v. Pelzer"*, (petition at 17, emphasis omitted), but because there was no constitutional violation at all. As this Court noted in *Hope v. Pelzer,* 536 U.S. ____, 122 S. Ct. ____, 153 L. Ed. 2 666, 676 (2002), "The threshold inquiry a court must undertake in a qualified immunity analysis is whether plaintiff's allegations, if true, establish a constitutional violation." Here, they do not, and, therefore, there was no need for the lower courts to even determine whether the State was entitled to qualified immunity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated at Madison, Wisconsin, this 14th day of November, 2002.

Respectfully submitted,

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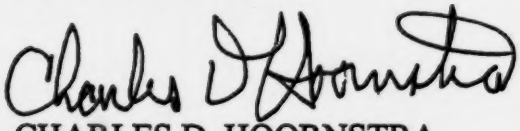

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